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7 **UNITED STATES BANKRUPTCY COURT**

8 **DISTRICT OF NEVADA**

11 In re:

12 USA COMMERCIAL MORTGAGE
13 COMPANY,

14 USA CAPITAL REALTY ADVISORS, LLC,

15 USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

16 USA CAPITAL FIRST TRUST DEED
17 FUND, LLC, and

18 USA SECURITIES, LLC,

19 Debtors.

Case No. BK-S 06-10725-LBR

Case No. BK-S 06-10726-LBR (closed)

Case No. BK-S 06-10727-LBR

Case No. BK-S 06-10728-LBR (closed)

Case No. BK-S 06-10729-LBR (closed)

CHAPTER 11

Jointly Administered under Case No.
BK-S-06-10725-LBR

**CURTIS F. CLARK'S RESPONSE TO
ORDER TO SHOW CAUSE**

Date: May 29, 2009

Time: 9:30 a.m.

Courtroom: 3

22 COMES NOW, CURTIS F. CLARK, creditor in the above-captioned Chapter 11 cases being
23 jointly administered under Case No. BK-S-06-10725-LBR, by and through his attorney of record,
24 Matthew Q. Callister, Esq., of the law firm of Callister & Reynolds, and hereby respectfully responds
25 to this Honorable Court's Order to Show Cause why he has not violated Fed.R.Bankr.P. 9011 and
26 Fed.R.Bankr.P. 9018, why the court should not bar Mr. Clark from filing further documents without
27 obtaining prior court approval, and why Mr. Clark's conduct does not warrant referral to the district
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1 court for criminal contempt proceedings, as follows.

2 This response is based upon the following points and authorities, affidavit of Curtis Clark, all
3 papers and pleadings on file in this matter, as well as any oral argument that may be entertained by
4 this Honorable Court at the time of hearing this matter.

5 6 **I. STATEMENT OF PERTINENT FACTS**

7 On February 12, 2009, the court clerk's office received and docketed a signed document from
8 respondent Curtis Clark. This document appears as docket entry no. 6813. The document was sent
9 in response and as an opposition to the USACM Liquidating Trust's Motion to Approve Settlement
10 with Debt Acquisition Company of America V, LLC. The response opposed the proposed settlement
11 and contained five specific objections. The fifth objection was entitled, "Compass Partners," and is
12 the subject of the instant Order to Show Cause.

13 After reviewing this response, Judge Linda B. Riegler recused herself from hearing all
14 contempt or other disciplinary proceedings relating to the Clark response. These matters were
15 transferred to the Honorable Bruce A. Markell, who issued the instant Order to Show Cause.

16 Specifically, this Honorable Court has pointed to five objectionable statements in the Clark
17 response, which may violate the Federal Rules of Bankruptcy Procedure. These are:

- 18 1. Stating that the Bankruptcy Court is a, "brothel,";
- 19 2. Stating that Judge Linda B. Riegler is a, "madam,";
- 20 3. Implying that professionals employed by the estate are comparable to prostitutes by
21 stating that they are, "working girls,"
- 22 4. Stating that Judge Riegler, "provides the condoms,";
- 23 5. Likening the proceedings in the bankruptcy court to an, "all night orgy."

24 This Honorable Court further noted that this list is merely a synopsis of the alleged
25 impropriety of the entire Clark response. As such, the entire Clark response, rather than simply these
26 five statements, is the subject of the instant Order to Show Cause. Moreover, this Honorable Court
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1 has specifically noted that the response may possibly violate Fed.R.Bankr.P. 9011 and
 2 Fed.R.Bankr.P. 9018. The Court also recognized in its Order to Show Cause that the Bankruptcy
 3 Court does not have the inherent authority to hold a party in criminal contempt, and thus required
 4 Curtis Clark to appear and show cause why this matter should not be referred to the Federal District
 5 Court for criminal contempt proceedings. On April 29, 2009, this Honorable Court lodged an
 6 Addendum to its Order to Show Cause, inviting Curtis Clark and any other interested parties to
 7 address the opinion of Price v. Lehtinen (In re Lehtinen), BAP No. NC-04-01534-BMaS, when
 8 responding to the Court's Order to Show Cause.

9
 10 Based upon the foregoing, Curtis Clark respectfully submits his response to this Honorable
 11 Court's Order to Show Cause and this Honorable Court's Addendum to Order to Show Cause.

12 II. LEGAL POINTS AND AUTHORITIES

13 Based upon the foregoing, Curtis Clark respectfully submits his response to this Honorable
 14 Court's Order to Show Cause and this Honorable Court's Addendum to Order to Show Cause.

15 A. ANALYSIS OF ORDER TO SHOW CAUSE UNDER FED.R.BANKR.P. 9011.

16 Fed.R.Bankr.P. 9011(b) reads, in relevant part:

17
 18 By presenting to the court (whether by signing, filing, submitting, or
 19 later advocating) a petition, pleading, written motion or other paper, an
 20 attorney or unrepresented party is certifying that to the best of the
 person's knowledge, information and belief, formed after an inquiry
 reasonable under the circumstances,

21 (1) it is not being presented for any improper purpose, such as to
 22 harass or to cause unnecessary delay or needless increase in the cost of
 litigation;

23 (2) the claims, defenses, and other legal contentions therein are
 24 warranted by existing law or by a nonfrivolous argument for the
 25 extension, modification, or reversal of existing law or the
 establishment of new law; [and]

26 (3) the allegations and other factual contentions have evidentiary
 27 support or, if specifically so identified, are likely to have evidentiary
 28 support after a reasonable opportunity for further investigation or
 discovery. . .

1 In response to this Honorable Court's request for Mr. Clark to demonstrate that each fact
 2 stated in his motion, which gave rise to this instant Order to Show Cause, is supported by the record,
 3 or that, "if Mr. Clark's statements were hyperbole, that such excesses were permissible advocacy and
 4 not attacks on Judge Riegle personally, or the bankruptcy court process generally."

5 Mr. Clark first posits to this Honorable Court that his statements contained in the documents
 6 at issue certainly fall under the classification of metaphor and hyperbole. To classify the statements
 7 that were made by Mr. Clark as factual in nature simply belies any rational application of such
 8 statements to the individuals which they reference or to the Bankruptcy Court. The United States
 9 Bankruptcy Court for the Southern District of Nevada is certainly not a, "brothel." It is a Federal
 10 Court system located and operating out of a government building. Judge Linda B. Riegle is certainly
 11 not a, "madam." She is a United States Bankruptcy Judge. Estate professionals certainly are not,
 12 "working girls," or prostitutes. They are attorneys, accountants and other trained, experienced
 13 professionals. Judge Riegle certainly has not, "provided condoms," to any person at any time during
 14 the pendency of this litigation. Finally, this case certainly is not an, "all night orgy." These
 15 statements simply cannot be construed, by any stretch of the imagination, as assertions of fact.

16 As Mr. Clark's statements can only rationally be construed as metaphor, which may rise to
 17 the level of hyperbole, Mr. Clark must demonstrate, as Ordered by this Court, that his statements
 18 were permissible advocacy, rather than personal attacks on Judge Riegle and on the Bankruptcy
 19 Court. Based upon the nature of Mr. Clark's statements, it is undeniable that he is displeased with
 20 the manner in which the instant action has proceeded, from the filing of the initial involuntary
 21 Chapter 11 petition in this case, through the present.

22 Mr. Clark is a member of a very large group of unsecured creditors in this action, who have
 23 sought from the outset of this case to recover any sums possible from the USA Capital entities. To
 24 date, literally millions of dollars have been expended from the USA Capital Liquidating Trust, funds
 25 that could and probably should be disbursed to the many creditors, such as Mr. Clark, to partially
 26 reimburse them for the enormous financial losses that they have suffered at the hands of the USA
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1 Capital entities. In Mr. Clark's case, he has lost virtually his entire life savings, in an amount of
2 approximately two hundred thousand dollars (\$200,000.00). However, the liquidating trust saw fit to
3 expend these millions of dollars searching for assets of the USA Capital entities. To date, despite
4 the millions of dollars in fees and costs that have been expended, virtually no assets of the USA
5 Capital entities have been recovered.

6 While certainly not an excuse, the above course of events provide a valid or at least
7 cognizable backdrop for Mr. Clark's frustrations. It is this frustration with the liquidating trust's
8 inability to recover assets, despite expending millions to do so, that prompted Mr. Clark's
9 metaphorical comments. While zealous in nature, and quite possibly overly-zealous, Mr. Clark's
10 hyperbole contained in his opposition is well grounded in the facts and procedural history of this
11 litigation. Admittedly, Mr. Clark's comments are neither popular nor shared by all of the creditors
12 and other parties in this action. However, there was, nevertheless, at least a factual and procedural
13 basis for Mr. Clark's hyperbole.
14

15 With that said, and with the benefit of hindsight, Mr. Clark in fact realizes how such
16 statements contained in his pleadings and documents could be construed as a violation of
17 Fed.R.Bankr.P. 9011(b), and how such comments can be viewed as inflammatory and improper. It
18 certainly was not the intention of Mr. Clark to cause any unnecessary delay or to increase the cost of
19 litigation in this action, by and through his pleadings. As such, Mr. Clark submits to this Honorable
20 Court that, if this Honorable Court finds that Mr. Clark violated Fed.R.Bankr.P. 9011(b), he did so in
21 a negligent and unintentional manner, rather than with malice or with an intent to harm either the
22 Honorable Judge Riegler or the Bankruptcy Court.
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24 **B. ANALYSIS OF ORDER TO SHOW CAUSE UNDER FED.R.BANKR.P. 9018.**

25 Fed.R.Bankr.P. 9018 does permit the court, "[o]n motion or its own initiative, with or
26 without notice, [to] make any order which justice requires...to protect any entity against scandalous
27 or defamatory matter contained in any paper filed in a case under the Code." "[a]llegations may be
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1 stricken as scandalous if the matter bears no possible relation to the controversy or may cause the
 2 objecting party prejudice.” Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir.
 3 1992). Material may be defamatory when it consists of untrue factual allegations. Knievel v. ESPN,
 4 393 f.3d 1068, 1073079 (9th Cir. 2005).

5 As discussed above, Mr. Clark is aware, upon reflection, how his statements can be construed
 6 to violate Fed.R.Bankr.P. 9011(b). While Mr. Clark still contends that the entirety of his previous
 7 pleadings sound in metaphor and simile, rather than of factual allegations, it nevertheless remains
 8 clear to Mr. Clark that it is possible for his pleading to be construed as possibly scandalous or
 9 defamatory. Moreover, as Case No. BK-S-06-10725-LBR has already resolved the issue of the
 10 proposed settlement between USACM Liquidating Trust and Debt Acquisition Company of America
 11 V, LLC, Mr. Clark’s objections as contained in his pleading have effectively been rendered moot
 12 and/or irrelevant, for purposes of that Motion to Approve Settlement. For these reasons, Curtis
 13 Clark does not object to an Order from this Court striking his pleading and subsequent letter which
 14 have given rise to this Order to Show Cause.

15 This Court has also advised, however, that it will consider barring Mr. Clark from making
 16 further Court filings, pursuant to 11 U.S.C. § 105(a). Said statute gives the Court the authority to
 17 take any action necessary to enforce or implement court orders or rules, or to prevent an abuse of
 18 process. In response, Mr. Clark respectfully proffers that, in spite of his pleadings and documents
 19 that have given rise to this Order to Show Cause, he is still a creditor in the instant action, with a
 20 pending claim of approximately two hundred thousand dollars (\$200,000.00). To simply bar Mr.
 21 Clark in his entirety from participating in this litigation with such a substantial claim at stake would
 22 serve to unfairly, “freeze-out,” Mr. Clark from any legal rights as a creditor that he may have from
 23 the issuance of such an Order onward.

24 A more appropriate remedy, also as suggested in this Honorable Court’s Order to Show
 25 Cause, would be to require Mr. Clark to obtain permission from the Court, prior to filing any
 26 pleadings in this action. This would strike a proper balance between the Court’s desire to effectuate
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1 compliance with Court rules and regulations and Mr. Clark's right to appear and participate in this
 2 action as a creditor. As such, Curtis Clark proposes that this Honorable Court, rather than issuing a
 3 complete bar from participation in this action by Mr. Clark, issue an Order that leave of Court be
 4 obtained by Mr. Clark, prior to filing any Motions or other responsive pleadings in this action.

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 6 **C. ANALYSIS OF ORDER TO SHOW CAUSE FOR REFERRAL OF CRIMINAL
 CONTEMPT MATTER.**

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 8 There are two types of contempt: civil and criminal. F.J. Hanshaw Enters., Inc. v. Emerald
 9 River Dev., Inc., 244 F.3d 1128, 1137-38 (9th Cir. 2001). When a sanction seeks to coerce
 10 compliance with a court order, it is in the nature of civil contempt, and when a sanction is punitive
 11 and levied to vindicate the authority of the court or otherwise protect the integrity of the judicial
 12 process, it is in the nature of criminal contempt. Int'l. Union United Mine Workers of Am. v.
 13 Bagwell, 512 U.S. 821, 827-28 (1994). While the bankruptcy court does not have the authority to
 14 issue criminal contempt, it may nevertheless refer criminal contempt matters to the District Court for
 15 the district in which it sits. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, n. 17 (9th Cir. 2003).

16 Criminal contempt referrals are made pursuant to 18 U.S.C. §§ 401(1) and 401(3). Criminal
 17 contempt under § 401(1) has four elements, which must be proven beyond a reasonable doubt: (1)
 18 misbehavior; (2) in or near the presence of the court; (3) with criminal intent; (4) that resulted in an
 19 obstruction to the administration of justice. United States v. Ortlieb, 274 F.3d 871, 874 (5th Cir.
 20 2001). Criminal contempt under § 401(3) requires disobedience or resistance to a court's
 21 lawful...rule. United States v. Galin, 222 F.3d 1123, 1127 (9th Cir. 2000).

22 In the instant action, the key factor that should be considered by this Honorable Court is
 23 whether or not Curtis Clark either: (1) acted with criminal intent, under the provisions of 18 U.S.C. §
 24 401(1), or (2) whether Curtis Clark acted with wilful disobedience to any rule of this Honorable
 25 Court, pursuant to 18 U.S.C. § 401(3).

26 With regard to this inquiry, it is important for this Honorable Court to understand that Mr.
 27 Clark was of the opinion, both prior to, during and subsequent to the filing of his documents that are
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1 the subject of this litigation, that his comments were in fact protected by Mr. Clark's First
2 Amendment rights. As this Honorable Court has noted in its Order to Show Cause, through the
3 cases of United States Postal Serv. v. Council of Greenburgh Civil Assocs., 453 U.S. 114 (1981) and
4 Int'l Soc. For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992), the Court's docket is
5 not a, "public forum," that will provide a protection for all forms of free speech, specifically those
6 that were expressed by Mr. Clark. Rather, the Court's docket is considered a, "non-public forum,"
7 the Court has the ability to control the time, place, manner and even content, provided that any such
8 limitations thereon are reasonable. See, Postal Serv.v. Greenburgh at 129-130. The Court has
9 sought to reasonably limit the nature of speech that may be placed upon the Court's docket, via filed
10 pleadings, through Fed.R.Bankr.P. 9011 and Fed.R.Bankr.P. 9018.

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12 Mr. Clark does not, through this response, challenge the propriety or constitutionality of the
13 provisions of Fed.R.Bankr.P. 9011 or Fed.R.Bankr.P. 9018. What Mr. Clark does seek, through this
14 response, is to demonstrate to the Court that he has made a miscalculation regarding the proper
15 classification of the Court docket as a non-public, rather than a public, forum, for First Amendment
16 purposes. What this mistake demonstrates is that Mr. Clark is an individual who is not trained nor
17 well-versed in the Federal Rules of Bankruptcy Procedure. He is not a trained attorney, nor is he
18 versed in the legal differentiations between a public and non-public governmental forum. As such,
19 he did not act with criminal intentions when filing the documents that are the subject of this Order to
20 Show Cause.

21 Mr. Clark was under the impression, albeit mistakenly, that his speech contained in his
22 subject documents was protected by the First Amendment. Upon review of this Court's Order to
23 Show Cause, that certainly appears to not be the case. However, at no time did Mr. Clark act with
24 any form of malice or criminal undertones when filing his documents. At no time did Mr. Clark
25 wilfully violate any of the Federal Rules of Bankruptcy Procedure that are the subject of this Order to
26 Show Cause. Rather, Mr. Clark acted negligently, under the mistaken belief that he was afforded
27 First Amendment protections in a forum that, again, he mistakenly believed was public in nature.
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1 This mistake clearly does not rise to the level of criminal intent or activity required for a finding of
 2 criminal contempt, under 18 U.S.C. § 401(1). Moreover, Mr. Clark did not act with intentional
 3 disobedience or resistance to any Court rule. He simply made a miscalculation as to what speech as
 4 permitted on a Court docket and what speech was not permitted.

5 In sum, the actions of Mr. Clark were negligent. Mr. Clark did not act with criminal intent,
 6 and to refer this matter to the Federal District Court for contempt proceedings will not serve to
 7 effectuate justice in this case. Mr. Clark should be educated about his mistake, specifically as to
 8 what language is and is not permitted in Court-filed pleadings. A criminal referral will not serve to
 9 promote any purpose or final goal that this Court seeks through the instant Order to Show Cause.
 10 The Bankruptcy Court is a Court of equity, fairness and ultimately forgiveness. Mr. Clark humbly
 11 requests that this Honorable Court take the steps suggested previously in this response, to both
 12 remedy the mistakes of Mr. Clark and to ensure that this situation does not repeat itself, rather than
 13 referring a retired man, who has lost his entire life savings, for criminal contempt proceedings in the
 14 Federal District Court.
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16 **D. ANALYSIS OF THE PRICE (IN RE LEHTINEN) OPINION IN REGARD TO THE**
 17 **PROPRIETY OF CIVIL SANCTIONS IN THIS MATTER.**

18 This Honorable Court has requested that responding parties to the Order to Show Cause
 19 address the holding of the Court in the case of Price v. Lehtinen (In re Lehtinen), BAP No. NC-04-
 20 01534-BMaS. While the facts of the Price decision are far from analogous to the instant case, Mr.
 21 Clark does note that the decision contains a significant amount of case law and other citation
 22 regarding the propriety of issuance of civil penalties, which, in turn, lend guidance to the nature and
 23 appropriateness of civil sanctions in this case.

24 The Price Court noted that a bankruptcy court's inherent power allows it to sanction, "bad
 25 faith," or, "willful misconduct," and allows the court to, "deter and provide compensation for a broad
 26 range of improper litigation tactics. Id. At 4983 (*citing Fink v. Gomez*, 239 f.3d 989, 992-93 (9th
 27 Cir. 2001)). However, "because of their very potency, inherent powers must be exercised with
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1 restraint and discretion.” *Id.* At 4984 (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991)).
 2 “Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit
 3 finding of bad faith or willful misconduct. *Id.* (*citing Fink*, 239 F.3d at 992-93). Bad faith or willful
 4 misconduct consists of something more egregious than mere negligence or recklessness. *Id.* (*citing*
 5 *Fink*, 239 F.3d at 993-94).

6 Regarding the characteristics of civil sanctions, as compared to sanctions that are punitive in
 7 nature, “civil penalties must either be compensatory or designed to coerce compliance.” *Id.* at 4985
 8 (*citing Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). A penalty is
 9 criminal (punitive) in nature, “if the contemnor has no subsequent opportunity to reduce or avoid the
 10 fine through compliance, and the fine is not compensatory.” *Id.* (*citing Dyer*, 322 F.3d at 1192). A
 11 penalty is also criminal if the sanction is intended, “to vindicate the authority of the court.” *Id.* At
 12 4985 (*citing F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.2d 1128, 1138 (9th Cir.
 13 2001). The Dyer Court specifically noted that even, “a flat unconditional fine totaling even as little
 14 as \$50.00 could be criminal if the contemnor has no subsequent opportunity to reduce or avoid the
 15 fine through compliance. *Id.* (*citing Dyer*, 322 F.3d. at 1192).

17 Pursuant to the *Fink* opinion, it is clear that sanctions against Curtis Clark are not appropriate
 18 in this case. As discussed previously, Mr. Clark was under the impression, albeit mistakenly, that his
 19 speech contained in his subject documents was protected by the First Amendment. Upon review of
 20 this Court’s Order to Show Cause, that certainly appears to not be the case. However, at no time did
 21 Mr. Clark act with any form of malice or criminal undertones when filing his documents. Such a
 22 mistake of the law constitutes negligence on the part of Curtis Clark. However, as held by *Fink*,
 23 mere negligence is not enough to sustain a civil sanction. Even if the actions of Curtis Clark, in
 24 filing his subject documents, rose to the level of recklessness, the issuance of civil sanctions against
 25 him would still be inappropriate, under *Fink*.

27 Moreover, in this case, there is a manner in which this Honorable Court can correct the
 28 mistakes of Curtis Clark and ensure that such mistakes do not occur again. In point of fact, it is this

Honorable Court that has suggested such remedies in its Order to Show Cause. Specifically, by striking the arguably inappropriate pleadings of Curtis Clark and requiring Court approval, prior to Mr. Clark filing any subsequent documents with the Court, will correct all of the wrongs that have created this situation. To financially penalize Mr. Clark, via a fine or sanction, will not serve to correct any of the conduct that Mr. Clark is accused of, nor serve as the most reasonable and effective deterrent against any future such filings.

For these reasons, Curtis Clark respectfully requests that this Honorable Court not issue monetary sanctions against him for his conduct, as any such fine would serve to vindicate the authority of the Court, rather than remedy the situation as it stands. Such sanctions are prohibited, as detailed in Hanshaw, cited above, and should not be issued by this Honorable Court.

III. CONCLUSION

Based upon the foregoing, and in the interest of jurisprudence, Curtis Clark has no objection to this Honorable Court striking his prior pleadings, which gave rise to this litigation. Curtis Clark also does not object to this Honorable Court issuing an Order requiring Curtis Clark to obtain Court approval, prior to filing any subsequent pleadings or other documents in this action.

Curtis Clark also requests that this matter not be referred to the United States District Court for criminal proceedings, as Curtis Clark lacked the requisite criminal intent and willfulness of conduct required to warrant either a referral of this matter to Federal District Court for criminal contempt proceedings or to issue civil sanctions against Mr. Clark in this Court. As such, Mr. Clark respectfully requests that neither course of action be followed by this Honorable Court.

DATED this 13 day of May, 2009.

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